No. 17-1471

In The Supreme Court of the United States

HOME DEPOT U.S.A., INC.,

Petitioner,

v.

GEORGE W. JACKSON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF DRI–THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER AND REVERSAL

TOYJA E. KELLEY,
PRESIDENT
DRI–THE VOICE OF THE DEFENSE BAR
55 West Monroe St.
Chicago, IL 60603
(312) 795-1101
toyja.kelley@saul.com

LAWRENCE S. EBNER
Counsel of Record
CAPITAL APPELLATE ADVOCACY PLLC
1701 Pennsylvania Ave., NW
Washington, DC 20006
(202) 729-6337
lawrence.ebner@capitalappellate.com

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 5

ARGUMENT 6

Excluding third-party class-action defendants from CAFA's expanded right to remove would perpetuate, or reinstate, state-court class-action abuses 6

A. Requiring national corporations to litigate, or settle, high-stakes interstate class actions in state courts is incompatible with civil justice 6

B. Court of Appeals decisions narrowly construing § 1453(b) fail to take into account CAFA's objective of removing interstate class actions from the throes of state-court abuses 15

C. Holding that CAFA's expanded right to remove encompasses third-party class-action defendants will deter proliferation or reinstatement of state-court class-action abuses 19

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

Cases

Am. Express Co. v. Italian Colors Rest.,
570 U.S. 228 (2013) 10

Amgen Inc. v. Conn. Ret. Plans & Trust Funds,
568 U.S. 455 (2013) 12

Arias v. Superior Court of San Joaquin Cty.,
46 Cal. 4th 969 (2009) 11

In re Baycol Cases I and II,
51 Cal. 4th 751 (2011) 11

Bristol-Myers Squibb Co. v. Super. Ct. of Calif.,
137 S. Ct. 1773 (2017) 13

Dart Cherokee Basin Operating Co. v. Owens,
135 S. Ct. 547 (2014) 2, 5

Epic Sys. Corp. v. Lewis,
138 S. Ct. 1612 (2018) 12

Halliwell v. A-T Solutions,
983 F. Supp. 2d 1179 (S.D. Cal. 2013) 11

Lee v. Dynamex, Inc.,
166 Cal. App. 4th 1325 (2008) 11

Mississippi ex rel. Hood v. AU Optronics Corp.,
571 U.S. 161 (2014) 15

In re Mortg. Elec. Registration Sys., Inc.,
680 F.3d 849 (6th Cir. 2012) 4, 18

Palisades Collections LLC v. Shorts,
552 F.3d 327 (4th Cir. 2008) ..... *passim*

Shamrock Oil & Gas Corp. v. Sheets,
313 U.S. 100 (1941) 4, 16, 17

Standard Fire Ins. Co. v. Knowles,
568 U.S. 588 (2013) 15, 21

Tri-State Water Treatment v. Bauer,
845 F.3d 350 (7th Cir.), *cert. denied*,
137 S. Ct. 2038 (2017) 4, 18, 19

Wal–Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011) 10

Westwood Apex v. Contreras,
644 F.3d 799 (9th Cir. 2011) 4, 18

In re: Whole Foods Market Group, Inc.,
No. 18-8006 (D.C. Cir. Oct. 11, 2018) 13

Williams-Yulee v. Florida Bar,
135 S. Ct. 1656 (2015) 7

Statutes & Rules

28 U.S.C. § 1441(a) 4, 16

28 U.S.C. § 1453(b) ..... *passim*

28 U.S.C. § 1711 note (CAFA §§ (2)(a)(2), (3), (4) & 2(b)(2), Pub. L. 109-2,119 Stat. 5 (2005)) 5, 7

Cal. Civ. Proc. Code § 382 11

Fed. R. Civ. P. 23 ..... 8, 9, 11

Fed. R. Civ. P. 23(a) 10

Fed. R. Civ. P. 23(f) 11

N.C. R. Civ. P. 23(a) & (c) 9

Other Authorities

American Tort Reform Ass'n, *Judicial Hellholes (2017-2018), available at* http://www.judicialhellholes.org 8

Carlton Fields Jorden Burt, P.A., *The 2018 Carlton Fields Class Action Survey* (2018), *available at* https://classactionsurvey.com 20

Competitive Enterprise Inst., Center for Class Action Fairness, *available at* https://cei.org/issues/class-action-fairness 14

Jay Tidmarsh, *Finding Room for State Class-Actions in a Post-CAFA World: The Case of the Counterclaim Class Action*, 35 W. St. U. L. Rev. 193 (2007-2008) 9

Jay Tidmarsh, *Living in CAFA's World*, 32 Rev. Litig. 691 (2013) 9, 14, 21

Remarks on Signing the Class Action Fairness Act of 2005, 41 Weekly Comp. Pres. Doc. 265 (Feb. 18, 2005) 13

The State of Class Actions Ten Years After the Enactment of the Class Action Fairness Act: Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary, 114th Cong. (2015) (statement of John Parker Sweeney, President, DRI–The Voice of the Defense Bar) 2

S. Rep. No. 109-14 (2005) ..... *passim*

Thomas D. Rowe, Jr., *State and Foreign Class-Action Rules and Statutes: Differences From—and Lessons For?—Federal Rule 23*, 35 W. St. U. L. Rev. 101 (2007-2008) 8

U.S. Chamber Inst. for Legal Reform, 2017 Lawsuit Climate Survey, *Ranking the States – A Survey of the Fairness and Reasonableness of State Liability Systems, available at* https://tinyurl.com/ybe62obn 20

INTEREST OF THE *AMICUS CURIAE*[1]

DRI–The Voice of the Defense Bar (www.dri.org) is an international membership organization composed of more than 20,000 attorneys who defend the interests of businesses and individuals in civil litigation. DRI's mission includes enhancing the skills, effectiveness, and professionalism of defense lawyers; promoting appreciation for the role of defense lawyers in the civil justice system; anticipating and addressing substantive and procedural issues germane to defense lawyers and fairness in the civil justice system; and preserving the civil jury. To foster these objectives, DRI participates as *amicus curiae* at both the petition and merits stages in carefully selected Supreme Court cases presenting questions that significantly affect civil defense attorneys, their corporate or individual clients, and the conduct of civil litigation.

DRI is participating as *amicus curiae* in this appeal because achieving *fairness* in class-action litigation is fundamental to civil justice. Class-action fairness begins with the critical need for an impartial trial court—a court competent to determine whether a putative class action should be allowed to proceed beyond the pleadings and threshold dispositive

---

[1] In accordance with Supreme Court Rule 37.6, *amicus curiae* DRI–The Voice of the Defense Bar certifies that no counsel for a party authored this brief in whole or part, and that no party or counsel other than the *amicus curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief. Petitioner's and Respondent's counsel of record have consented to the filing of this brief.

motions, and if so, whether a class should be certified. To that end, DRI has filed in this Court a substantial number of *amicus* briefs which present the civil defense bar's views and practical perspective on substantive and procedural issues that implicate class-action fairness. For example, DRI's merits-stage *amicus* brief in *Dart Cherokee Basin Operating Co. v. Owens*, No. 13-719 (filed May 29, 2014), argued that there should be no "presumption against removal" under the Class Action Fairness Act ("CAFA")—a position with which the Court agreed. *See Dart Cherokee*, 135 S. Ct. 547, 554 (2014) (holding that "no antiremoval presumption attends cases under CAFA").

DRI also promotes class-action fairness through its Center for Law and Public Policy, whose Class Action Task Force monitors major class actions throughout the United States and when appropriate, recommends legislative and judicial reforms. Through the Center, DRI has submitted written comments and provided oral testimony to Congress about the compelling need to establish and maintain class-action fairness, including with regard to a defendant's right to remove putative interstate class actions from state to federal court. *See, e.g., The State of Class Actions Ten Years After the Enactment of the Class Action Fairness Act: Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. (2015) (statement of John Parker Sweeney, President, DRI–The Voice of the Defense Bar). Along the same lines, DRI has addressed class-action fairness issues by providing written comments and oral testimony to

the Rule 23 Subcommittee of the Advisory Committee on Civil Rules.

* * * * *

The removal-blocking tactic which the Court has agreed to review in this case not only conflicts with the plain text and indisputable purpose of CAFA's expanded diversity jurisdiction removal provision, 28 U.S.C. § 1453(b), but also undermines class-action fairness. CAFA is intended "to ensure that class actions that are truly interstate in character can be heard in federal court," where "such cases properly belong," and thereby eliminate a "parade of abuses" both by "plaintiff-friendly" state courts and the class-action plaintiffs' bar. S. Rep. No. 109-14 ("Senate Report"), at 5, 6, 27 (2005).

In a number of States, however, class counsel have succeeded in circumventing § 1453(b) on the theory that the right to remove an otherwise qualifying interstate class action under § 1453(b) does not extend either to third-party defendants or to additional defendants joined through the filing of a counterclaim. Based on that theory, opportunistic consumer class-action lawyers have recruited individual defendants in carefully selected, seemingly mundane, state-court debt-collection suits to lodge third-party class-action complaints (or class-action counterclaims)—rather than indisputably removable, separate class actions—against previously non-party national corporations such as Petitioner Home Depot here.[2]

---

[2] References in this brief to third-party class-action complaints and third-party class-action defendants apply equally to class-

This Court has agreed to review, and hopefully will rectify, this "unfortunate loophole," *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 345 (4th Cir. 2008) (Niemeyer, J., dissenting from the denial of rehearing en banc), which four federal circuits, based on *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), have read into § 1453(b). *See Palisades*, *supra*; *Tri-State Water Treatment v. Bauer*, 845 F.3d 350 (7th Cir.), *cert. denied*, 137 S. Ct. 2038 (2017); *Westwood Apex v. Contreras*, 644 F.3d 799 (9th Cir. 2011); *In re Mortg. Elec. Registration Sys., Inc.*, 680 F.3d 849 (6th Cir. 2012).

DRI defers to Petitioner's common-sense, plain-text reading of § 1453(b): Under § 1453(b)—which unlike the general removal provision, 28 U.S.C. § 1441(a), broadly refers to "*any* defendant" (emphasis added)—a qualifying class action "may be removed" regardless of whether it is a third-party (or counterclaim) class action. DRI also agrees with Petitioner's discussion regarding why the Court's nearly 80 year-old opinion in *Shamrock Oil*—which only addresses removal by a counterclaim defendant that is the original plaintiff in a state-court suit—does not control. Rather than repeating Petitioner's arguments, this *amicus* brief highlights, from the civil defense bar's perspective, the reasons why excluding a third-party class-action defendant from the statutory right to remove a putative interstate class action under § 1453(b) defeats, rather than promotes, CAFA's overarching objective of class-action fairness.

---

action claims filed against additional defendants by means of counterclaims (i.e., "counterclaim class actions").

SUMMARY OF ARGUMENT

This Court explained in *Dart Cherokee* that "CAFA's 'provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant.'" 135 S. Ct. at 554 (quoting S. Rep., *supra* at 43). The CAFA removal provision at issue in this appeal, 28 U.S.C. § 1453(b), expressly authorizes "any defendant" to remove a qualifying class action to federal district court, and thereby avoid state-court class-action abuses. *See* 28 U.S.C. § 1711 note (CAFA § 2(a)(2), (3) & (4), Pub. L. No. 109–2, 119 Stat. 5 (2005)) (describing state-court class-action abuses, including state courts "keeping cases of national importance out of Federal court" and "acting in ways that demonstrate bias against out-of-State defendants"); *see also* S. Rep., *supra* at 10-27 (providing an encyclopedic discussion of state-court class-action abuses).

State-court class-action abuses include, for example, (i) expansive assertion of specific personal jurisdiction over, and hostility toward, out-of-state corporate defendants; (ii) loose interpretation and lax, inconsistent, and/or unpredictable application, of state-court class-action rules; (iii) actual or apparent bias against corporate defendants concerning threshold legal defenses, timing and scope of discovery, class certification, admission of expert testimony, and approval and administration of class settlements; and (iv) limited opportunities for timely and meaningful appellate review.

The lower courts' interpretation of § 1453(b), which deprives third-party class-action defendants of

CAFA's expanded right to remove, is a major impediment to the very type of class-action reform that CAFA was enacted to achieve. Further, although not directly before the Court in this case, the same is true for a corporate defendant which, under a similarly crabbed reading of § 1453(b), cannot remove otherwise qualifying class-action claims because it is the original plaintiff in a debt-collection suit. Allowing class-action plaintiffs' attorneys to sidestep removal, and thereby pursue high-stakes ($5,000,000+) consumer class actions in state trial courts of their choosing, turns the clock back to before CAFA was enacted and obstructs the Act's purpose and operation.

ARGUMENT

Excluding third-party class-action defendants from CAFA's expanded right to remove would perpetuate, or reinstate, state-court class-action abuses

A. Requiring national corporations to litigate, or settle, high-stakes interstate class actions in state courts is incompatible with civil justice

According to the Fourth, Sixth, Seventh, and Ninth Circuits, the class-action plaintiffs' bar can dodge CAFA removal, and pursue national consumer class actions in plaintiff-friendly state courts, by cajoling individual defendants in garden-variety debt collection suits to file third-party class-action complaints against previously non-party corporate defendants.

If the Supreme Court were to green-light this ploy by construing the unambiguous phrase "any defendant" in § 1453(b) to exclude any defendant that is subjected to class-action claims by means of a third-party complaint, a tsunami of interstate class-action litigation would inundate state courts throughout the United States. Allowing those types of class actions to remain in state court would defeat one of CAFA's express purposes: "restor[ing] the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." 28 U.S.C. § 1711 note (CAFA § 2(b)(2), Pub. L. No. 109–2, 119 Stat. 5 (2005)); *see also Palisades Collections LLC v. Shorts*, 552 F.3d at 342 (Niemeyer, J., dissenting) ("CAFA § 2 [Findings and Purposes] addresses the federalism principle, stating that Congress intended the extension of federal jurisdiction over large interstate class actions and liberalization of removal to *further* the proper balance of federalism"); S. Rep., *supra* at 23 (discussing class actions and federalism).

DRI's members have extensive experience attempting to obtain a fair shake for national corporate defendants that are subjected to state-court liability suits—including in plaintiff-friendly jurisdictions where state-court trial judges' electoral campaigns routinely receive substantial financial support from the plaintiffs' bar. *See generally Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1662 (2015) (noting that "[i]n 39 States, voters elect trial or appellate judges at the polls").

The daunting uphill battles that national corporations and their defense counsel encounter on tilted, slippery, state-court playing fields are greatly exacerbated when litigation involves even frivolous class-action allegations. Two of the circuits (Seventh and Ninth) that have interpreted § 1453(b) in a way that precludes class-action defendants from successfully removing third-party complaints to federal district courts encompass some of the nation's worst state-court "judicial hellholes." *See* American Tort Reform Ass'n, *Judicial Hellholes (2017-2018)* (listing California and Madison & Cook Counties, Illinois as among the nation's worst).[3] But the burdens, risks, and injustices suffered by corporations that are compelled to defend or settle class actions in state courts are not limited to the civil-justice-inferno jurisdictions that perenially appear on the judicial hellholes list. The following are some of the formidable challenges that national corporations encounter when subjected to class-action claims in state courts *througout* the United States:

1. All federal district courts are governed by the stringent, detailed, and periodically amended class-action criteria and procedures set forth in Federal Rule of Civil Procedure 23, and by this Court's federal class-action jurisprudence. Each State, however, is free to adopt and interpret its own class-action rules. Although many States have adopted some form of the current version, or an earlier iteration, of Rule 23, there are significant variations among and within state court systems. *See* Thomas

---

[3] *Available at* http://www.judicialhellholes.org.

D. Rowe, Jr., *State and Foreign Class-Action Rules and Statutes: Differences From—and Lessons For?—Federal Rule 23*, 35 W. St. U. L. Rev. 101 (2007-2008). For example, Rule 23 of the North Carolina Rules of Civil Procedure—which would apply to the class-action claims in this case if the Fourth Circuit's remand to state court were affirmed—merely consists of four sentences, only two of which are potentially relevant. *See* N.C. R. Civ. P. 23(a) & (c).

Indeed, the law professor who mapped the easy-to-follow CAFA escape route at issue in this appeal acknowledged that Federal Rule of Civil Procedure 23 "differs textually in some important ways from some state class-action rules; and if we also consider the different interpretations that states adopting the text of Federal Rule 23 sometimes give to their own class-action rules, the gulf between state class-action practice and federal class-action practice grows wider." Jay Tidmarsh, *Finding Room for State Class-Actions in a Post-CAFA World: The Case of the Counterclaim Class Action*, 35 W. St. U. L. Rev. 193, 195-96 (2007-2008); *see also* Jay Tidmarsh, *Living in CAFA's World*, 32 Rev. Litig. 691, 693 (2013) (citing the Senate Report "[f]or a description of the generous state-court interpretations of state class action rules[,] laws and usages that motivated Congress to pass CAFA").

2. The Senate Report explains in the section entitled "Purposes" that when class actions are adjudicated in state courts, "the governing rules are applied inconsistently (frequently in a manner that contravenes basic fairness and due process considerations) and . . . there is often inadequate

supervision over litigation procedures and proposed settlements." S. Rep., *supra* at 4; *see also id.* at 14. Moreover, "there appears to be state court provincialism against out-of-state defendants or a judicial failure to recognize the interests of other states in the litigation." *Id.* at 6.

3. According to the Senate Report, one "type of class action abuse that is prevalent in state courts in some localities is the 'I never met a class action I didn't like' approach to class certification," even going so far as to certify classes "that federal courts had already found uncertifiable." *Id.* at 22. "So-called 'drive-by class certification' cases, in which a class is certified before the defendant has a chance to respond to the complaint, or in some cases, has even received the complaint," are among the "most egregious examples" of the "'laissez faire' attitude of some state courts" to class certification. *Id.*

Such a reflexive approach to the granting of class certification—widely viewed as *the* critical event in the life of any class action—is the polar opposite of the "rigorous analysis" that this Court has emphasized a federal district court must conduct to determine whether "the prerequisites of Rule 23(a) have been satisfied." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011) (internal quotation marks omitted). Since Rule 23(a) "imposes stringent requirements for certification that in practice exclude most claims," *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013), it is not surprising that plaintiffs' attorneys prefer to pursue class-action claims in state courts

that operate under elastic, if not arbitrary, class-certification criteria. Indeed, class-action lawyers in California even have succeeded in circumventing that State's scant class-action provision, Cal. Civ. Proc. Code § 382, for certain state-court representative actions. *See Arias v. Superior Court of San Joaquin Cty.*, 46 Cal.4th 969, 975 (2009) (holding that California class-action requirements "need not be met when an employee's representative action against an employer is seeking civil penalties under the Labor Code Private Attorneys General Act"); *but see Halliwell v. A-T Solutions*, 983 F. Supp. 2d 1179, 1182-84 (S.D. Cal. 2013) (Fed. R. Civ. P. 23 applies when such "PAGA" actions are litigated in federal court).

4. Many state courts do not have a counterpart to Federal Rule of Civil Procedure 23(f), which authorizes federal courts of appeals to permit an interlocutory appeal of "an order granting or denying class-action certification." Some States have adopted a "death knell doctrine" that allows a plaintiff to pursue an immediate appeal of a trial-court order that *terminates* class claims. *See, e.g.*, *In re Baycol Cases I and II*, 51 Cal. 4th 751, 757-60 (2011) (discussing "death knell" doctrine); *Lee v. Dynamex, Inc.*, 166 Cal. App. 4th 1325 (2008) (reversing state trial court order denying class certification). But there may be little, if any, opportunity for a class-action defendant to obtain timely and meaningful interlocutory review of a state-court order *granting* class certification.

5. Corporate defendants are under considerable pressure to settle virtually any class action where

certification has been, or likely is to be, granted. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018) (quoting *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsberg, J., dissenting)) (acknowledging it is "well known that [class actions] can unfairly '[p]lace pressure on the defendant to settle even unmeritorious claims'")); *see also Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 485 (2013) (Scalia, J., dissenting) ("Certification of the class is often, if not usually, the prelude to a substantial settlement by the defendant because the costs and risks of litigating further are so high."); *id.* at 495 n.9 (Thomas, J., dissenting) (referring to "*in terrorem* settlement pressures" following class certification).

When state trial courts grant certification, the pressure on corporate defendants to settle untested and often spurious class-action claims is perhaps even greater than in federal court. The "unbounded leverage" that class-action attorneys enjoy in plaintiff-friendly state courts "can essentially force corporate defendants to pay ransom to class attorneys by settling—rather than litigating—frivolous lawsuits." S. Rep., *supra* at 20.

To compound such "judicial blackmail," *id.*, "[i]n too many cases, state court judges are readily approving class action settlements that offer little—if any—meaningful recovery to the class members and simply transfer money from corporations to class counsel." *Id.* at 4; *see also id.* at 14 ("[L]awyers, not plaintiffs, may benefit most from settlements . . . the attorneys receive excessive attorneys' fees with

little or no recovery for the class members themselves."); Remarks on Signing the Class Action Fairness Act of 2005, 41 Weekly Comp. Pres. Doc. 265, 266 (Feb. 18, 2005) (prior to CAFA, "[i]n many cases, lawyers went home with huge payouts, while the plaintiffs ended up with coupons worth only a few dollars").

6. The rough justice meted out by state courts to national corporations subjected to class-action claims is not limited to the skewed interpretation and/or freewheeling application of inadequately protective state class-action rules. For example—

- Due process limitations on a state court's exercise of specific personal jurisdiction over class-action defendants that are not "at home" in a forum State remain a matter of controversy. *See, e.g.*, *Bristol-Myers Squibb Co. v. Super. Ct. of Calif.*, 137 S. Ct. 1773, 1789 n.4 (2017) (Sotomayor, J., dissenting) (stating that "[t]he Court today does not confront the question of whether its opinion here would also apply to a class action in which a plaintiff in the forum State seeks to represent a nationwide class"). Lower courts continue to struggle with this important jurisdictional question. *See, e.g.*, *In re: Whole Foods Market Group, Inc.*, No. 18-8006 (D.C. Cir. Oct. 11, 2018) (Order allowing interlocutory appeal regarding applicability of *Bristol-Myers* jurisdictional limits to putative nationwide class).

Even where there are solid threshold grounds for disposing of a putative class action on jurisdictional or justiciability grounds, trial-prone state courts are generally reluctant to grant motions to dismiss or for summary judgment. As a result, once a national

corporation is haled into a state-court class-action proceeding, it most probably is there to stay unless and until it agrees to an exorbitant settlement, or suffers an adverse judgment, destined to enrich class counsel at the expense of class members. *See* S. Rep., *supra* at 14; Competitive Enterprise Inst., Center for Class Action Fairness ("Unfair settlements generally serve self-interested lawyers and third parties at the expense of absent class members, the group of people whose rights are traded away to settle a class action").[4]

- State-court class-action litigation burdens not only are substantial, but also frequently imposed prematurely. To help plaintiffs bolster speculative class-action claims, and perhaps induce early settlement, many state trial courts routinely allow full-blown merits discovery even prior to class certification.

- In the event that a state-court class-action defendant takes the risk of going to trial, *Daubert*-type admissibility standards for expert testimony may not apply.

7. Insofar as CAFA has succeeded in reducing the number of interstate class actions filed, or adjudicated or settled, in state courts, *see* Tidmarsh, *Living in CAFA's World*, *supra* at 693 n.10, achievement of that congressional goal presumably has resulted in state trial courts composed of many judges who have little experience presiding over major class actions. An opinion by this Court authorizing class-action plaintiffs' attorneys to

---

[4] *Available at* https://cei.org/issues/class-action-fairness.

engage in the removal-evasion strategy at issue in this appeal would instantaneously reopen the state-court class-action floodgates. That would enable judges, sitting in state trial courts long imbued with pro-plaintiff/anti-corporation bias, to preside over high-stakes interstate class actions in a way that would be even more problematic for civil justice than was the case in 2005 when CAFA was enacted.

B. Court of Appeals decisions narrowly construing § 1453(b) fail to take into account CAFA's objective of removing interstate class actions from the throes of state-court abuses

"CAFA's primary objective [is] ensuring 'Federal court consideration of interstate cases of national importance.'" *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 595 (2013)) (quoting CAFA § 2(b)(2), Pub. L. 109-2, 119 Stat. 5); *see also Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 165 (2014) (discussing how CAFA "loosened the requirements for diversity jurisdiction for . . . 'class actions'"); S. Rep., *supra* at 5, 30 (CAFA's fundamental purposes include "expanding federal jurisdiction over interstate class actions," which "typically involve more people, more money, and more interstate commerce ramifications than any other type of lawsuit").

The Fourth Circuit acknowledged in its opinion here that "CAFA, and in particular 28 U.S.C. § 1453(b), was adopted to extend removal authority beyond the traditional rules" in order to "curb perceived abuses of the class action device which, in the view of CAFA's proponents, had often been used

to litigate multi-state or even national class actions in state courts." App. 4a-5a (internal quotation marks omitted). But the court's holding that the broad and unambiguous phrase "any defendant" in § 1453(b) does not really mean what it says ignores that provision's indisputable purpose of removing most class actions from state trial courts, thereby "mak[ing] it harder for plaintiffs' counsel to 'game the system.'" S. Rep., *supra* at 5.

More specifically, the Fourth Circuit adhered to its earlier decision in *Palisades Collections*, which "applied *Shamrock Oil* and held that an additional counter-defendant was not 'the defendant or defendants' because it was not a defendant against whom the original plaintiff asserted a claim." App. 6a (quoting *Palisades Collections*, 552 F.3d at 336).[5] *Shamrock Oil*, however, only addressed the authority of the original plaintiff to remove a breach-of-contract counterclaim under the 1887 predecessor to the current and substantially similar general removal statute, 28 U.S.C. § 1441(a). In holding that the general removal provision's reference to "the defendant or the defendants" does not encompass an *original* counterclaim defendant, the Court in *Shamrock Oil* found "of controlling significance . . . the Congressional purpose *to narrow* the federal jurisdiction on removal" in the 1887 general removal provision compared to its more liberal, 1875 predecessor. *Shamrock Oil*, 313 U.S. at 107 (emphasis added).

---

[5] The Fourth Circuit's term "additional counter-defendant" includes third-party class-action defendants as well as class-action counterclaim defendants. *See* App. 5a n.1.

Shamrock Oil does not involve class-action removal: The Court's 1941 holding based on the *narrowing* of the 1887 general removal statute compared to its 1875 predecessor obviously did not address the "*expanded* removal authority *for class actions*," App. 4a (emphasis added), that Congress established in 2005 through enactment of CAFA. *See Palisades Collections*, 552 F.3d at 344 (Niemeyer, J., dissenting) ("Section 1453(b), by authorizing 'any defendant' to remove, makes *Shamrock Oil* inapplicable in the CAFA context . . . ."); *see also* S. Rep., *supra* at 6 (indicating that "the concept of class actions that are a familiar part of today's legal landscape did not arise until 1966"). Nor does *Shamrock Oil* take into account the congressional intent—the objective of avoiding state-court class-action abuses—underlying CAFA's expansion of class-action removal authority for the benefit of "any defendant." Thus, the better reading of § 1453(b) is that *any* class-action "may be removed," regardless of the procedural vehicle through which the class-action is asserted.

Neither the Fourth Circuit panel opinion here, nor that court's majority opinion in *Palisades Collections*, expresses any concern about the practical consequences of its short-sighted § 1453(b) interpretation: Allowing class-action plaintiffs and their lawyers to defeat removal simply by filing third-party class-action complaints would enable them, in concert with plaintiff-friendly state courts, to continue perpetrating the very types of class-action abuses that CAFA was enacted to prevent,

and thereby "subvert the intent of the Act." S. Rep., *supra* at 48.

The other circuit opinions that have addressed the issue are equally myopic.

Consider the Ninth Circuit majority opinion in *Westwood Apex v. Contreras*, 644 F.3d 799 (9th Cir. 2011). According to that opinion, Congress could not have "intended to modify the original defendant rule" ("limiting the right of removal to original defendants") because "there is no mention of '*Shamrock Oil*' or 'third-party' or 'counterclaim defendant' in the entirety of the Senate Report." *Id.* at 806; *see also In re Mortg. Elec. Registration Sys., Inc.*, 680 F.3d at 854 (adopting *Westwood Apex*). Lack of congressional intent should not be inferred, however, merely because the 2005 Senate Report failed to explicitly anticipate the post-CAFA anti-removal tactic at issue. Indeed, in his separate opinion in *Westwood Apex*, Circuit Judge Bybee explained "[i]t is thus counterintuitive that CAFA does not authorize the removal of this suit . . . the removing parties . . . were forced into state court when [the original defendant] transformed a $20,000 debt-collection lawsuit into an unrelated multi-million dollar class action by filing a counterclaim not only against the original plaintiff, but also against the removing parties." *Id.* at 807, 809 (Bybee, J., concurring).

Also consider the Seventh Circuit's 2017 opinion in *Tri-State Water Treatment v. Bauer*, 845 F.3d 350, which like the present case, involves a counterclaim class action against Home Depot. *Tri-State* "began as a simple collection action brought in the Small

Claims Court of Madison County, Illinois." *Id.* at 352. The defendant transformed that collection suit into a "multi-state class action" alleging consumer fraud against the original plaintiff and *additional* defendants, including Home Depot. *Id.* Home Depot removed the case to federal court under § 1453(b). Affirming the district court's remand, the court of appeals stated that although "CAFA made some changes to the removal rules for large, state-law based class actions," keeping the multi-state class action litigation in Madison County, Illinois state court somehow would do the "least damage to . . . litigation efficiency." *Id.* at 354, 355. Oblivious to reality—including the fact that Madison County, Illinois is widely viewed as one of the nation's worst judicial hellholes—the court of appeals disagreed with Home Depot's contention that requiring interstate class-action claims to remain in state court "would re-introduce the forum-shopping CAFA was designed to eliminate." *Id.* at 356.

C. Holding that CAFA's expanded right to remove encompasses third-party class-action defendants will deter proliferation or reinstatement of state-court class-action abuses

Class actions, including those filed in or removed to federal court, continue to be a major burden on American business and industry. A recent survey indicates that—

- Class-action spending continues to rise annually. Companies spent $2.24 billion on class actions in 2017.

- The magnitude of class-action exposure and risk also continues to increase.
- Almost 70% of companies face one or more class actions on a continuing basis.
- Consumer fraud claims remain the second most prevalent type of class action.
- Class-action settlement rates have increased to more than 70%.

Carlton Fields Jorden Burt, P.A., *The 2018 Carlton Fields Class Action Survey* at 1-2 (2018).[6]

Corporate counsel's perceptions of the litigation environment in a State's court system "is likely to impact important business decisions at their companies, such as where to locate and do business." U.S. Chamber Inst. for Legal Reform, 2017 Lawsuit Climate Survey, *Ranking the States – A Survey of the Fairness and Reasonableness of State Liability Systems*, at 3.[7] State courts' treatment of class actions, and state trial judges' impartiality and competence, are among the key factors affecting how corporations view the fairness of a State's litigation environment. *See id. at* 4, 11, 15, 20, 21. Generally improved corporate perceptions of state liability systems in recent years, *see id.* at 3, may be due in part to "the effect of CAFA," since "at least initially . . . federal courts saw a significant uptick in the number of class actions either filed in or removed to

---

[6] *Available at* https://classactionsurvey.com.
[7] *Available at* https://tinyurl.com/ybe62obn.

federal court." Tidmarsh, *Living in CAFA's World*, *supra* at 693 n.10.

By reading the phrase "any defendant" in § 1453(b) to exclude third-party class-action defendants, however, the lower courts not only have "exalt[ed] form over substance, and run directly counter to CAFA's primary objective," *Standard Fire Ins. Co. v. Knowles*, 568 U.S. at 595, but also enabled state courts to remain in, or revert to, the pre-CAFA world. This Court can, and should, restore nationwide uniformity, and facilitate CAFA's unequivocal intent, by holding that the phrase "any defendant" in § 1453(b) includes third-party class-action defendants.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

TOYJA E. KELLEY,
PRESIDENT
DRI–THE VOICE OF
THE DEFENSE BAR
55 WEST MONROE ST.
CHICAGO, IL 60603
(312) 795-1101
toyja.kelley@saul.com

LAWRENCE S. EBNER
Counsel of Record
CAPITAL APPELLATE
ADVOCACY PLLC
1701 Penn. Ave., NW
Washington, DC 20006
(202) 729-6337
lawrence.ebner@capital
appellate.com

Counsel for Amicus Curiae

November 2018